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Halliburton II: Supreme Court Upholds Basic Presumption

Article By:

John M. Vassos

Karen Pieslak Pohlmann

On June 23, the U.S. Supreme Court issued its long-anticipated decision in *Halliburton Co. v. Erica P. John Fund, Inc.* **(*Halliburton II*)**.[1] Chief Justice Roberts delivered the opinion of the Court, in which Justices Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan joined. Justice Ginsburg filed a concurring opinion, in which Justices Breyer and Sotomayor joined. Justice Thomas filed an opinion concurring in the judgment, in which Justices Scalia and Alito joined.

The *Halliburton II* case generated significant publicity because it presented the **Supreme Court with the opportunity to reexamine** the fraud-on-the-market presumption created in ***Basic v. Levinson***.[2] The Court in *Basic* held that, in a securities fraud class action, the plaintiff is entitled to a rebuttable presumption of reliance and, therefore, does not have to prove that each investor in the class relied on any alleged material misrepresentation. The foundation for the fraud-on-the market theory is the efficient-market theory, which presumes that, in an efficient market, all material, public information about a company is absorbed by the marketplace and reflected in the price of the security. The efficient-market theory has been under increasing attack in recent years, leading many to believe that the time may have come to overturn *Basic*.

In *Halliburton II*, the Supreme Court addressed whether to continue the fraud-on-the-market presumption unchanged, to cease the applicability of the fraud-on-the-market presumption altogether, or to alter the presumption. In the Court's opinion, the majority declined to overrule or modify *Basic's* presumption of classwide reliance, but it did hold that defendants may rebut the presumption at the class certification stage by introducing evidence that the alleged misrepresentation did not impact the market price. The majority determined that Halliburton had not demonstrated the "special justification" necessary to overturn "a long-settled precedent."[3] The majority also rejected Halliburton's request that the plaintiffs be required to show a price impact to invoke the presumption because "this proposal would radically alter the required showing for the reliance element."[4] The majority did hold that defendants can rebut the presumption by showing lack of price impact at the class certification stage because "[t]his restriction makes no sense, and can readily lead to bizarre results."[5] The majority therefore vacated the U.S. Court of Appeals for the Fifth Circuit's judgment and remanded for further proceedings.

In a concurring opinion, Justice Ginsburg, joined by Justices Breyer and Sotomayor, noted that,

although the decision would "broaden the scope of discovery available at certification," the increased burden would be on defendants to show the absence of price impact, not on plaintiffs whose burden to raise the presumption of reliance had not changed.[6]

In a separate opinion concurring only in the judgment, Justice Thomas, joined by Justices Scalia and Alito, argued that *Basic* should be overturned for three reasons. First, the fraud-on-the–market theory has "lost its luster"[7] in light of recent developments in economic theory.[8] Second, the presumption permits plaintiffs to bypass the requirement—as set forth in some of the Court's most recent decisions on class certification—that plaintiffs affirmatively demonstrate compliance with Rule 23. Third, the *Basic* presumption of reliance is "largely irrebuttable" because "[a]fter class certification, courts have refused to allow defendants to challenge any plaintiff's reliance on the integrity of the market price prior to a determination on classwide liability,"[9] therefore effectively eliminating the reliance requirement.

The Supreme Court's decision has significant implications for securities fraud litigation, particularly at the class certification stage. Although plaintiffs need not prove direct price impact and may instead still raise the presumption of reliance by showing an efficient market and that the information was material and public, defendants may now rebut this presumption before class certification by showing a lack of price impact. We believe that defendants' ability to rebut the presumption by showing no price impact effectively swallows the rule that plaintiffs need not prove a price impact. This will undoubtedly lead to a battle of the experts at the class certification stage. Although the Court's decision does not explicitly affect other proceedings, such as a motion to dismiss, the scope of the decision will certainly be tested in the coming months and years.

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[1]. No. 13-317 (U.S. June 23, 2014), *available* here.

[2]. 485 U.S. 224 (1988).

[3]. *Halliburton II*, No. 13-317, slip op. at 4; *see generally id.* at 4–16.

[4]. *Id.* at 17.

[5]. *Id.* at 19.

[6]. *Id.* at 1 (Ginsburg, J., concurring).

[7]. *Id.* at 7 (Thomas, J., concurring).

[8]. *Id.* at 8–9.

[9]. *Id.* at 13.

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